IN THE UTAH COURT OF APPEALS

ARTHUR W. COCKS and JULIE L. COCKS, Trustees of the Cocks Family Trust, dated August 11, 2006 Plaintiffs/Appellees v. SWAIN'S CREEK PINES LOT OWNERS' ASSOCIATION; CHARLES F. COSTA; ALAN W. ZELLHOEFER; GINA M. CHAPMAN; JANELLE PEARCE; WILLIAM G. MOSER; JAMES BRADFORD; ELIZABETH MARIE BAYLEY; CHERYL CASE; DOES I-XX, Defendants/Appellant	Case No. 20200961-CA

On appeal from the ruling of the Sixth District Court for Kane County
The Honorable Marvin D. Bagley

APPELLANT'S REPLY BRIEF

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I. ARGUMENT [1]

A. The Trial Court's Holding that Section 1 of the Unit 3 CC&Rs Is Ambiguous Is Incorrect Because the Plain Meaning of Section 1 Unambiguously Prohibits RVs, and the Trial Court Erred in Looking to Extrinsic Evidence.

1. The trial court erred in interpreting Section 1 to allow RVs because the plain meaning of Section 1 unmistakably prohibits RVs.

The plain language of Section 1 is unequivocal: RVs are not allowed. "The 'overriding principle' of contract interpretation 'is that the intention of the parties is controlling.'" *Greyhound Lines, Inc. v. Utah Transit Auth.*, 2020 UT App 144, ¶ 34, 477 P.3d 472 (quoting *Layton City v. Stevenson*, 2014 UT 37, ¶ 21, 337 P.3d 242). "And the best indication of the parties' intentions is the language they selected to express those intentions." *Greyhound Lines*, 2020 UT App 144, ¶ 34. The last sentence of Section 1 limits the structures allowed on lots to "a first class private dwelling house, patio walls, swimming pool, and customary outbuildings, garage, carport, servants' quarters, or guest house." (R. at 236.) "No

[1] The factual allegations in the Cockses' Second Amended Complaint occupy pages 213 to 232 of the record. Almost two pages in section D of their Statement of the Case cite these allegations. (Appellees' Br. at 12-14.) Thus, some things represented as facts in their brief are not facts at all, including that the Board failed to give proper notice of meetings, that the Cockses' petitions should have stayed Board action, and that the Board adopted the October 2016 Resolution rather than "concede" the two membership votes, which the Cockses mischaracterize as rejecting Board action to enforce the RV prohibition in the Unit No. 3 CC&Rs.

improvement or structure whatever, other than" these, "may be erected, placed, or maintained on any lots." (R. at 236.)

The Cockses argue (at 33) that the absence in the Unit 3 CC&Rs of a definition of "a first class private dwelling house" and the words "RV" or "trailer," particularly in the last sentence of Section 1, means that an RV or a trailer is a "first class private dwelling house."[2] This argument fails for three reasons. First, it contradicts the logical inference that by explicitly identifying the structures allowed on lots, Section 1 prohibits all other structures—including RVs. *See Monson v. Carver*, 928 P.2d 1017, 1025 (Utah 1996) (recognizing that the "expression of one term or limitation is understood as an exclusion of others"). The Cockses fail to counter this inference.

Second, an RV is not a house, which Mr. Cocks even admitted at trial. (R. at 2254-55). The ordinary and usual meaning of house does not refer to an RV. People do not refer to RVs as houses because RVs are not buildings. *See, house*, Merriam-Webster, https://www.merriam-webster.com/dictionary/house (last accessed Aug. 11, 2021) ("a building that serves as living quarters for one or a few families"); *house*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/house (last accessed

[2] There is no dispute that an RV is not "patio walls, swimming pool, [or] customary outbuildings, garage, carport, servants' quarters, or guest house." (R. at 236.)

Aug. 11, 2021) ("a building that people, usually one family, live in"). Because an RV is not a first-class private dwelling house, Section 1 prohibits RVs.

Third, an RV is not a permanent structure. As the trial court recognized, RVs "come and go." (R. at 1887-88). In contrast, the list of permitted structures in the last sentence of Section 1 are permanent. Reading that sentence to allow RVs when it only allows permanent structures is illogical and unreasonable. *See Lutz v. Panetta*, 307 So. 3d 996, 997 (Fla. Dist. Ct. App. 2020) (concluding that "[t]he only reasonable interpretation of the covenants as a whole prohibits Appellees from attempting to live in a recreational vehicle in a residential subdivision meant to include only permanent fixed dwellings").

Other provisions in Section 1 only strengthen interpretating Section 1 to prohibit RVs. The first sentence limits lot use for "single-family residential purposes only" as "mountain cabin residential recreational sites." (R. at 236.) The Cockses do not argue that the word "residential," and its root word, "residence," denote a community of permanent structures, not vehicles. The Cockses also fail to explain how reading Section 1 to allow RVs does not render the word "cabin," or for that matter, "house," superfluous.

Even though Mr. Cocks admitted at trial that an RV is neither a cabin nor a house (R. at 2253-54), the Cockses now argue that those words do not exclude RVs because the "CC&Rs make no provision for eviction or to assess a penalty

upon RV or trailer users." (Appellees' Br. at 34.) Not so. The Unit 3 CC&Rs broadly allow the Association (as the revisionary owner's successor) to enforce "a violation or breach of any of these covenants, conditions, reservations and restrictions . . . at law or equity to compel compliance." (R. at 241.) As for eviction, a homeowners association in Utah cannot evict owners from their own property for violating use restrictions in a declaration. An association may either fine an owner, *see* Utah Code § 57-8a-208 (2021) (authorizing board to assess fines), or sue the owner for damages or injunctive relief, *see id.* § 57-8a-212.5 (2021) (recognizing a lot owner's failure to comply with the governing documents is grounds for legal action).

In sum, the Cockses' arguments do not support the trial court's incorrect conclusion that Section 1 allows RVs. Rather, the plain language of Section 1 unambiguously prohibits RVs, and the trial court erred in concluding otherwise. Section 1 only allows the structures listed in its last sentence, and an RV is not one of them. Reading Section 1 to allow RVs invalidates the ordinary and usual meaning of the words, fails to harmonize its provisions, and renders certain provisions meaningless. Consequently, this Court should reverse the trial court.

2. Section 1 is unambiguous because it is not plausible or reasonable to interpret Section 1 to allow RVs, and so the trial court erred by using extrinsic evidence.

Allowing RVs is not a reasonable interpretation of Section 1. For the same reasons argued above, that interpretation is not plausible and reasonable in light of the language of Section 1. *See Mind & Motion Utah Invs., LLC v. Celtic Bank Corp.*, 2016 UT 6, ¶ 24, 367 P.3d 994 (An alternative interpretation of a contract term "must be plausible and reasonable in light of the language used." (quoting *First Am. Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d 834, 837 (Utah 1998)). It is neither reasonable nor plausible to read Section 1 to allow RVs when the only structures allowed are "a first-class private dwelling house, patio walls, swimming pool, and customary outbuildings, garage, carport, servants' quarters, or guest house," and when lot use is limited to "single-family residential purposes only" as "mountain cabin residential recreational sites." (R. at 236.) For the same reasons, there is no missing term or facial deficiency in Section 1. Thus, the "specific significance" the trial court placed on the absence of "RV" or "trailers" in the last sentence of Section 1 (R. at 1887) was misplaced.

Like the trial court, however, the Cockses look to extrinsic evidence to find and support an ambiguity. "A court will look to extrinsic evidence only if the

contract is ambiguous."[3] *UDAK Properties LLC v. Canyon Creek Com. Ctr. LLC*, 2021 UT App 16, ¶¶ 14-15, 482 P.3d 841. Because, as just argued, the Association's reading of Section 1 is the only reasonable interpretation, Section 1 is not ambiguous, and the trial court erred by looking to extrinsic evidence.

Not only that, the trial court erred by using extrinsic to *find an ambiguity*. "Extrinsic evidence cannot be used to create an ambiguity not reasonably supported by the text of the contract." *Brodkin v. Tuhaye Golf, LLC*, 2015 UT App 165, ¶ 21, 355 P.3d 224. Thus, the extrinsic evidence the trial court used to find ambiguity—Rule 16 and the Association's historic interpretation, application, and enforcement of Section 1—and of Section 1, does not help the Cockses. Even, for the reasons below, that evidence does not support reading Section 1 as ambiguous. In sum, the Section 1 is not ambiguous, and the trial court erred by looking to extrinsic evidence.

[3] The exception is that "[c]ourts may examine extrinsic evidence that uncovers a 'latent ambiguity' that is not apparent from the 'face of the instrument.'" *E & H Land, Ltd. v. Farmington City*, 2014 UT App 237, ¶ 12, 336 P.3d 1077 (quoting *Watkins v. Henry Day Ford,* 2013 UT 31, ¶ 28, 304 P.3d 841). However, this does not apply here because the meanings of the operative terms in Section 1 are undisputed, and none of the parties raised the issue.

B. Even If the Trial Court Were Correct that Section 1 is Ambiguous, Its Findings in Support of Reading Section 1 to Allow RVs Are Clearly Erroneous.

If the trial court correctly found an ambiguity in Section 1 (though it did not), and extrinsic evidence was allowed, the court's factual findings still defy the clear weight of evidence. A finding is clearly erroneous "if it is against the clear weight of evidence," *Doelle v. Bradley*, 784 P.2d 1176, 1178 (Utah 1989), or "without adequate evidentiary support," *Brady v. Park*, 2019 UT 16, ¶ 72, 445 P.3d 395, 415 (quoting *State v. Walker*, 743 P.2d 191, 193 (Utah 1987)), or if the reviewing court "otherwise reaches a firm conviction that a mistake has been made," *SA Grp. Properties Inc. v. Highland Marketplace LC*, 2017 UT App 160, ¶ 24, 424 P.3d 187 (quotation simplified). A finding is also clearly erroneous if it is "induced by an erroneous view of the law." *Brady*, 2019 UT 16, ¶ 72 (quoting *Walker*, 743 P.2d at 193) (internal quotation mark omitted).

The Cockses fail in their attempts to neutralize the developer's testimony of the intent of the Unit 3 CC&Rs. The Cockses do not dispute that "principles of contract interpretation require [courts] to give effect to the meaning intended by the parties at the time they entered into the agreement." *Uintah Basin Med. Ctr. v. Hardy*, 2005 UT App 92, ¶ 12, 110 P.3d 168. There was only one party[4] to the Unit

[4] While interpretation of restrictive covenants is "governed by the same rules of construction as those used to interpret contracts," *Swenson v. Erickson*, 20016 UT ¶ 11, 998 P.2d 807, this does not mean that restrictive covenants *are* contracts,

3 CC&Rs and that was the developer, referred to in those CC&Rs as the "reversionary owner."[5] Keith Christensen, who managed the developer, J.B. Investment Company, was one of its officers and was involved in drafting the Unit 3 CC&Rs. (R. at 241, 1964, 1972, 1995.) He testified that the developer's intent was to exclude trailer and RV use. (R. at 1890.)

As the Cockses point out (at 38), however, the trial court found Keith's testimony unpersuasive. (R. at 1891). But this finding is against the clear weight of evidence and induced by an erroneous view of the law. Keith testified that the developer allowed trailers in the Unit 1 CC&Rs, [6] but that the developer expressly left trailers out of the Unit 3 CC&Rs because trailers had become unsightly. (R. at 1978, 1969.) For that reason, the developers intended the Unit 3 CC&Rs to allow "certain things on the land, and that's it." (R. at 1978-79.) Rather than list everything that was prohibited, like trailers, the developer "listed

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which require at least two parties. Rather, the Unit 3 CC&Rs are equitable servitudes. *See Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P.2d 618, 623 n.6 (Utah 1989) (recognizing that privity is not required for a covenant to run in equity); *see also Equitable Servitude*, Practical Law Glossary Item 6-581-7932 (defining equitable servitude not to require horizontal or vertical privity).

[5] The trial court and the Cockses mistakenly refer to the reversionary owner as the revisionary owner.

[6] Specifically, the Unit 1 CC&Rs provide, "No trailer of less than 30 feet may be placed permanently on any lot and trailer must be metal finished and of good exterior quality," meaning that trailers of more than 30 feet with metal finishes of good exterior quality are allowed in Unit 1. (Defs.' Trial Ex. 6, Ex. A at 159, § D(2).)

affirmatively what could be placed on the property." (R. at 1983, 1991.) The only structures allowed were "a first class private dwelling house, patio walls, swimming pool, and customary outbuildings, garage, carport, servants' quarters, or guest house." (R. 236; *see* R. at 1973, 1988-98.)

The Cockses only justification for the trial court rejecting Keith's testimony is that lawyers, not Keith, drafted the Unit 3 CC&Rs. However, that Keith did not pen the Unit 3 CC&Rs is unimportant. As officer of the developer, he read the Unit 3 CC&Rs, reviewed them, and talked with the drafting attorneys about them. (R. at 1972, 1964, 1995.) For these reasons, he was perfectly qualified to testify of the developer's intent. The Cockses also argue that the developer was a separate entity, but it was not. The one and only entity who signed the Unit 3 CC&Rs was the developer, J.B. Investment Company. (R. at 241.) Thus, Keith's testimony on the developer's intent is undiminished.

While the Cockses quote the trial court's findings about Keith's testimony, they leave it at that. But there are fatal problems with the findings. In discounting Keith's testimony, the trial court found that the purpose of Section 1 was to prohibit business uses in order to preserve and enhance the beauty of Unit 3. (R. at 1890-91.) While this is certainly *a* purpose of Section 1, the trial court ignored the last sentence of Section 1, which plainly evinces *another* purpose: to prohibit any structures, "whatever, other than a first class private dwelling house, patio

walls, swimming pool, and customary outbuildings" (R. at 236), and this Keith made clear in his testimony. The trial court's finding therefore lacks adequate evidentiary support and does nothing to weaken Keith's testimony.

The trial court also rejected Keith's testimony because he testified that Section 1 requires owners to have cabins, and trailers are not allowed (R. at 1982; *see* R. at 1891.) Yet without explanation or support from the record, the trial court disregarded Keith's testimony because, in the trial court's view, not allowing lot owners to camp or use a trailer on their mountain property "is inconsistent with general ownership of mountain property in Utah," and does not harmonize "with mountain land use generally." (*See* R. at 1891.) With the support of only the trial court's personal beliefs on the ownership and use of mountain property, the court's finding lacks any evidentiary support.

Not only that, as the Association pointed out in its initial brief, and the Cockses fail to dispute, the finding was induced by an erroneous view of the law. Restrictive covenants "can be used for any purpose that is not illegal or against public policy." *Smith v. Simas*, 2014 UT App 78, ¶ 14, 324 P.3d 667. Indeed, a use restriction "may even have a certain degree of unreasonableness to it, and yet withstand attack in the courts." *Hidden Harbour Ests., Inc. v. Basso*, 393 So. 2d 637, 640 (Fla. Dist. Ct. App. 1981). There is no law or public policy trumping the

ability of restrictive covenants to limit property to certain permanent structures on mountain property.[7]

The Cockses attack (at 24) the expert testimony of real-estate appraiser Chris Dahlin, who testified that based on his experience, including experience with the Subdivision and other mountain areas, an RV would not fit within the definition of "mountain cabin." (R. at 2431-32.) The Cockses point out that the that the trial court sustained their attorney's objection to Dahlin's testimony (R. 2429.) But the Cockses conveniently neglect to mention that the trial court backtracked and *overruled* the objection. (R. at 2430.)

Also contradicting the trial court's holdings that Section 1 is ambiguous and allows RVs is the expert testimony of attorney John Richards. He testified that in his experience, the term "mountain cabin" in a declaration does not include an RV. (R. at 2451.) The same goes for "first class private dwelling house." (R. at 2451.) Also, when a board interprets the governing documents, "it

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[7] The Cockses also argue (at 36) that by offering and relying on the developer's testimony, the Association admitted ambiguity. Not so. The Association has consistently maintained that Section 1 unambiguously prohibits RVs and that extrinsic evidence does not support finding an ambiguity. (*See, e.g.*, R. at 1101-05, 1301-05, 1633-35, 1686-89.) But the Association had to offer such evidence because the trial court looked beyond the four corners of the Unit 3 CC&Rs. Still, offering evidence supporting an alternative, albeit inconsistent, argument is not an admission that another other argument lacks merit. *See* Utah R. Civ. P. 8(e) (providing that a party may use "legal and equitable defenses regardless of consistency").

certainly isn't an indication" that the governing documents are not clear. (R at 2461-2462.)

To counter the mountain of testimony that Section 1 unambiguously prohibits RVs, the Cockses depend (at 37-38) on Theodore Long's testimony. Long, who served on the Association's Board from 1998 to 2002, testified about a discussion he had with Barbara Christensen, who was part of the developer and was, along with her husband and their son Keith, one of the original members of the Board. (R. at 40-41, 1966, 1993, 2538.) Long stated that according to Barbara, the Unit 3 CC&Rs, as opposed to the Unit 1 CC&Rs, prohibited trailers, which at the time meant mobile homes. (R. at 2545, 2549-50.) Long equivocally testified that the developer was not "addressing RVs or camper trailers, I don't believe, at the time." (R. at 2545.) Long expressed that when the developer "mentioned trailer in the CC&Rs, [it was] referring to mobile homes, not RVs." (R. at 2552.) When asked by the Cockses' counsel if "the whole RV issue was not one that was even contemplated at the time" (in the late 1970s), Long replied, "I guess not, no." (R. at 2552-53.)

Based on Long's testimony, the trial court found that the developer "intended to exclude placement of mobile homes. (R. at 1887.) "However, the same understanding did not apply to the use of trailers or RVs" because mobile

homes are attached to property as permanent dwellings, whereas "[t]railer and RV use is of a temporary use in the nature of camping." (R. at 1887-88.)

These findings are clearly erroneous for two reasons. First, the overriding principle of interpreting contracts is that the parties' intent is controlling, and the best evidence of intent is the language used to express that intent. *Greyhound Lines*, 2020 UT App 144, ¶ 34.[8] Section 1 prohibits any structure "whatever" from being "erected, placed, or maintained" on lots "other than a first class private dwelling house, patio walls, swimming pool, and customary outbuildings, garage, carport, servants' quarters, or guest house." (R. at 236.) It defies the central principle of contract interpretation to nonetheless find that despite this language, the developer intended to allow RVs.

Second, the only party to the Unit 3 CC&Rs was the developer. Yet the trial court gave more weight to what Long, a non-party believed and thought about what the developer told him and rejected the developer's direct testimony. To be sure, this Court defers to a trial court's considerable discretion in determining the

[8] The Cockses also make a series of unpreserved and unsupported arguments. They correctly note that they and the Association were not original parties to the CC&Rs and that neither were able to negotiate the terms of the Unit 3 CC&Rs. But what relevancy this has, the Cockses do not say, and regardless, any argument that these facts affect the interpretation of Section 1 is unpreserved. Also unsupported and unpreserved is the Cockses' argument that the Unit 3 CC&Rs are a contract of adhesion. Finally, the Cockses imply that the Unit 3 CC&Rs should be construed against the drafter. But not only is this unpreserved, but the Association is not the drafter.

credibility of witnesses. *Bonnie & Hyde, Inc. v. Lynch*, 2013 UT App 153, ¶ 17, 305 P.3d 196. But here, the trial court's reason for rejecting the only direct evidence of the developer's intent at the time the Unit 3 CC&Rs were signed is that the developer's intent interfered with the court's notions of "general ownership of mountain property in Utah," and does not harmonize "with mountain land use generally." (*See* R. at 1891.) For these reasons, it was not reasonable for the trial court to favor Long's testimony and discards Keith Christensen's testimony.

The trial court also found that "Long conceded he took no action to exclude RVs from the subdivision when he was a member of the board." (R. at 1888.) But this finding is also clearly erroneous. It lacks adequate evidentiary support because Long explained. Long served on the Board over a decade before the increasing number of RVs became a problem. (R. at 2454, 2473-75.) No one asked him whether they could have an RV on their lot, and, based on his recollection, the issue never came before the Board. (R. at 2542.) Naturally, Long would not have acted to exclude RVs. Indeed, in Long interpreted Section 1 of the Unit 3 CC&Rs to exclude RVs. (R. at 2540-41.) And in his opinion, a first-class private dwelling house is a stick-built structure, and does not include RVs. (R. at 2541.)

Finally, the Cockses attempt to bolster the trial court's faulty reliance on Rule 16, but they misconstrue the Association's arguments and miss the

significance—or rather insignificance—of the word "trailers" in Rule 16. Rule 16 directs that "[a]ll structures, including cabins, *trailers*, garages, sheds, decks, stairs, shelters, etc. shall be kept in safe and good repair." (R. at 1884 (emphasis added).)

The trial court's reliance on "trailers" in Rule 16 was clearly erroneous for two reasons. First, the clear weight of evidence shows that the Association included "trailers" in Rule 16 because the Unit 1 CC&Rs allow trailers. But like the trial court, the Cockses disregard that Rule 16, like the Association's other rules, applies to all the Units (phases) in the Subdivision (*see* at R. 286-88) and that the Unit 1 CC&Rs allow trailers (*see* R. at 1967-68; Defs.' Trial Ex. 6, Ex. A at 159, § D(2)). Thus, a rule requiring owners to keep structures in good repair naturally includes keeping "trailers" in Unit 1, whose CC&Rs explicitly allow trailers, in good repair.

To attribute any other significance to "trailers" in Rule 16 ignores the Unit 1 CC&Rs and the last sentence of the Unit 3 CC&Rs, which omits "trailers" from the list of the structures allowed in Unit 3. Consequently, by including "trailers" in Rule 16, the Association did not "convey[] the association's knowledge, support, and approval of RV use in the subdivision." (R. at 1884.) Rather, the clear weight of evidence is that the Association simply recognized in Rule 16 that the Unit 1 CC&Rs allow trailers.

Second, the trial court's findings on Rule 16 were induced by an erroneous view of law. The trial court interpreted Rule 16 on equal footing with Section 1 of the Unit 3 CC&Rs as if Rule 16 could alter the restrictions in Section 1. However, "[a] rule may not be inconsistent with provision of the association's declaration." Utah Code § 57-8a-218(17) (2021). And a rule adopted by an association's board "yields to any conflicting provision in [the declaration]." *Id.* § 57-8a-228(5)(f) (2021).[9] In other words, an association's rulemaking power does not extend to rules that contravene the declaration. *See Weldy v. Northbrook Condo. Ass'n*, 279 Conn. 728, 738, 904 A.2d 188, 194 (2006) (recognizing that a board-enacted rule cannot "contravene either an express provision of the declaration or a right reasonably inferable therefrom" (quoting *Beachwood Villas Condo. v. Poor*, 448 So. 2d 1143, 1145 (Fla. Dist. Ct. App. 1984)); *see Holleman v. Mission Trace Homeowners Ass'n*, 556 S.W.2d 632, 637 (Tex. Civ. App. 1977) (reforming board resolution that exceeded scope of rulemaking authority). Thus, Rule 16 is not evidence that Section 1 of the Unit 3 CC&Rs is ambiguous or that Section 1 allows RVs.

All in all, the clear weight of extrinsic evidence is that Section 1 unambiguously prohibits RVs. Mr. Cocks admitted at trial that an RV is neither a cabin nor a house. (R. at 2253-54.) And the testimonies of Keith, Christopher

[9] Both these statutes apply "regardless of when the association is created." Utah Code §§ 57-8a-218(18), -228(9)(a).

Dahlin, and John Richards are monumental. Combined with the legal errors in the trial court's findings, and the insignificance of Rule 16, contrary evidence is clearly outweighed.

C. The Trial Court Erred When It Incorrectly Applied the Business Judgment Rule and Substituted Its Judgment for the Board's.

The Cockses' invoke the wrong standard of review for the business judgment rule. Their first case, *Salt Lake City Citizens Congress v. Mountain States Telephone & Telegraph Co.*, 846 P.2d 1245 (Utah 1992), has no bearing here. That case did not hold that it is arbitrary and capricious to apply a different rule of law in a case concerning the same facts. *See id.* 846 P.2d at 1255. And even if it did, the Cockses' neglect to explain its relevancy. Likewise, *Vial v. Provo City*, 2009 UT App 122, ¶ 9, 210 P.3d 947, and *Specht v. Big Water Town*, 2017 UT App 75, ¶ 31, 397 P.3d 802, do not apply because the Board is not an administrative agency. Those cases involved appeals of land-use decisions, in which an agency's decision is arbitrary and capricious unless supported by substantial evidence in the record. *See* Utah Code § 10-9a-801(3)(c)(i) (2021) ("A land use decision is arbitrary and capricious if the land use decision is not supported by substantial evidence in the record.").

Rather, the trial court's holding on the application of the business judgment rule is a conclusion of law, which is reviewed for correctness. *Fort Pierce Indus. Park Phases II, III & IV Owners Ass'n v. Shakespeare*, 2016 UT 28, ¶ 15,

379 P.3d 128. Thus, the inquiry is not whether the trial court was arbitrary and capricious but rather whether the trial court correctly applied the business judgment rule. The court did not.

By adopting the October 2016 Resolution, the Board used its business judgment to forgo enforcement of the RV prohibition in the CC&Rs against current owners with RVs on their lots until the Resolution's triggering event: an owner's sale of a lot to unrelated third party, i.e., someone other than family, and to enforce the RV prohibition against future owners, (*See* R. at 286-88.)

The Cockses argue (at 40) that the October 2016 Resolution was arbitrary and capricious because it deprived them "of [a] permissible use." But that is not accurate, and it is not quite what the trial court held. The trial court *upheld* the prospective application of the October 2016 Resolution to future lot owners but then *substituted* its judgment for the Board's by replacing the triggering event for the Cockes to "such time as there is a change of use of their property," meaning that the Cockses are allowed an RV until they or a future owner, related or not, stop placing RVs on the Cockses' lot. (*See* at R. at 1883, 1893-94.) The trial court reasoned that the Board did not use "its best judgment," in pursuing enforcement against existing lot owners with RVs and impermissibly attempted to change its interpretation of the CC&Rs. (R. at 1893.) But the trial court erred by parsing the October 2016 Resolution this way. There are three reasons.

First, the October 2016 Resolution did not change the Association's interpretation of the Unit 3 CC&Rs and it did not change the CC&Rs. Even Mr. Cocks admits that previous Boards interpreted Section 1 to prohibit RVs (although, he testified, they were lax in their enforcement). (R. at 2264.) Moreover, as John Richard's opined, a board "resolution can interpret, clarify, and procedurally improve upon what's already there." (2460.) The October 2016 Resolution "does not change the CC&Rs." (R. at 2464, R. 2466.) The Resolution simply puts the Board back into a posture of enforcing the CC&Rs as written by postponing enforcement against non-conforming lots until an owner sells. (R. at 2459.)

Second, the trial court disregarded instances in the Utah Community Association Act that support the October 2016 Resolution. As the Association argued in its initial brief, the Act also uses the sale of property to a third party as the triggering event for terminating a property use. But the Cockses leave this point unanswered.

Third, the trial court sidestepped the substance of Utah Code § 57-8a-213. The business judgment rule does not allow a court to substitute its judgment for a board's if the board follows the procedure in Utah Code § 57-8a-213, in deciding whether to take or not take enforcement action. It is uncontested that the Board carefully followed this procedure in preparing, researching, and

adopted the October 2016 Resolution. Thus, there is nothing arbitrary or capricious about the Resolution.

D. The Clear Weight of the Lack-of-Enforcement Evidence Is Not that Section 1 Is Ambiguous or that it Allows RVs, It Is that the October 2016 Resolution Is a Perfect Example of the Business Judgment Rule in Action.

The evidence of the Association's failure to enforce the RV restriction in Section 1 is not evidence the Section 1 is ambiguous or that it allows RVs; it is evidence that the October 2016 Resolution is valid. But first, marshalling: The Cockses' position on marshalling is outdated. A court is not strictly bound to affirm the trial court's findings in the absence of marshalling because the reviewing court should "address the merits of an appellant's argument without relying on marshaling as a 'stand-alone' basis for rejecting claims on appeal." *Tobler v. Tobler*, 2014 UT App 239, ¶ 14, 337 P.3d 296 (quoting *State v. Nielsen*, 2014 UT 10, ¶ 44, 326 P.3d 645). To be sure, "a party challenging a factual finding or sufficiency of the evidence to support a verdict will almost certainly fail to carry its burden of persuasion on appeal if it fails to marshal." *Nielsen*, 2014 UT 10, ¶ 42.

But marshalling does not require an appellant to play "devil's advocate" or present "every scrap of competent evidence" in a "comprehensive and fastidious order." *Id.* ¶ 43. (quoting *Chen v. Stewart*, 2004 UT 82, ¶¶ 77-78, 100 P.3d 1177). Rather, "marshalling is a natural extension of an appellant's burden of

persuasion." *Nielsen*, 2014 UT 10, ¶ 41. And ultimately, "[t]he focus should be on the merits of the arguments presented, not on some arguable deficiency in the appellant's duty of marshalling." *Tobler v. Tobler*, 2014 UT App 239, ¶ 14 (quotation simplified). The Association has met its burden of persuasion because the merits of its arguments overcome any deficiency in marshalling.

As for the evidence, the Cockses offer a series of assertions supported by a string cite to the record. But the record is not as supportive and generous as the Cockses suggest. It is true that for the lot owners' testimony cited they uniformly were unaware of Board action against RVs until 2015. But Patricia Martin, was the only witness who testified that Board members told her she could put an RV on her lot. (R. at 2118-19). Holly Hunter testified that no one from Association told her she could have RV. (R. at 2164.) The person she bought her lot from told her she could use it for a trailer. (R. at 2174.)

Of the testimony cited, only Arthur Cocks said that he received approval from the Association for RV improvements to his lot. (R. at 2200). But when he bought his lots, he told Board member Allen Zellhoefer he was planning on building a cabin within a year or two. (R. at 2527.) Arthur Cocks acknowledged that previous Board's interpreted the CC&Rs to prohibit RVs. (R. at 2264.) And there had been enforcement measures as early as 2007. (R. at 712, 719, 876.)

Only Todd Call testified that he paid assessments (dues) to the Association. (R. at 2069-68). But this is misleading because all owners pay assessments. (*See* R. at 238.) This is no indication that the Association interpreted Section 1 to allow RVs.

The Cockses assert (at 43) that a "former Board member was quick to make clear that trailers and RVs were allowed and the focus was on keeping mobile homes out of the subdivision." This Board member was Theodore Long, but testified that trailers were only approved on a temporary basis when someone was building a cabin. (R. at 2551.) The Cockses also contend (at 43) that "not a single witness testified they had been involved in an action to remove RVs or trailers in Unit 3." This is misleading because the only way for the Association to have removed RVs or trailers would have been a court order. Not suing owners for violating a restriction is no indication that the restriction is ambiguous or does not exist.

The trial court weighed and applied the evidence of and lack of enforcement as reasons the Unit 3 CC&Rs are ambiguous and do not prohibit RVs. This was an error because the clear weight of evidence that the Board did not enforce the RV probation *supports* the Board's decision to adopt the October 2016 Resolution, which, because the hardship and expense to the Association,

refrained enforcement of the RV prohibition until a sale to an unrelated third party.

The Board's previous action to address the increase of RVs in the Subdivision bear this out. In 2013, the Board proposed a CC&R amendment to allow existing RVs to remain. (R. at 2369.) But the *owners rejected* the amendment. (R. at 2356.) Then in September 2016, the Board proposed another CC&R amendment that would have allowed owners to keep their RVs until they sold their lots. (R. at 2303.) The *owners rejected* this too. (R. at 2303.) All this shows that Board's purpose in adopting the October 2016 Resolution was the only solution to allow current RVs but prevent future RVs. As a result, the trial court should be reversed.

E. The Trial Court's Findings Ignore the Anti-Waiver Provision in the Unit No. 3 CC&Rs, and the Association Did Not Clearly Intend to Waive Both the RV Prohibition and the Anti-Waiver Provision.

Evidence that the Association accepted assessments is not evidence of the Association's clear intent to waive the RV prohibition and the anti-waiver provision. An association collects assessments from every member. *See* Utah Code § 57-8a-301 (recognizing an association lien for assessments on lots).

Evidence that the Association allowed one or more RV owners to the improve their lots is also not evidence of the Association clear intent to waive the

RV prohibition and the anti-waiver provision. Owners are free to improve their lots in accordance with the Unit 3 CC&Rs.

Evidence that past Board members told Patricia Martin (or even other owners, though such evidence is not in the record) that she could have an RV on her lot is not evidence of the Association's clear intent to waive the RV prohibition and the anti-waiver provision—especially in the Cockses' case. As the trial court recognized during trial: "The evidence of what the Association did with other lot owners cannot be used by [the Cockses] as a waiver of the Association's rights." (R. at 2090.)

The contrary evidence in the record makes it all the more hopeless for the Cockses to overcome the absence findings on the anti-waiver provision. That evidence includes Arthur Cockses' admissions at trial that before the Cockses' bought their lots, the Board had taken the position that RVs were contrary to the Unit No. 3 CC&Rs and that the Board had acted to enforce the RV prohibition in 2007 and 2013. (R. at 2264.) Of those actions, Mr. Cocks admitted they were significant because they showed that the Board "not only knew the RVs were [in the Subdivision], but also believed the RVs were contrary to the CC&Rs." (R. at 2264.) Mr. Cocks also admitted that his "real problem was that past boards believed the RVs were contrary to the CC&Rs but hadn't taken significant enforcement action with respect to all RV owners." (R. at 2264.)

In sum, without findings and evidence of the Association's clear intent to waives the RV prohibition and the anti-waiver provision, the RV in prohibition in Section 1 stands.

II. CONCLUSION

This Court need look no further than the four corners of the Unit 3 CC&Rs. Section 1 unambiguously prohibits RVs in Unit 3. The only structures allowed are "a first class private dwelling house, patio walls, swimming pool, and customary outbuildings, garage, carport, servants' quarters, or guest house." There is no other reasonable or plausible interpretation. The trial court erred in holding otherwise and admitting extrinsic evidence not only to determine the meaning of Section, but to find it was ambiguous. The trial court also erred in replacing its judgment with the Board's. And neither the RV prohibition nor the anti-waver provision in the Unit 3 CC&Rs were waived. This Court should reverse the trial court.

August 18, 2021.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(g)(l) because according to the word processing program used to prepare this brief (Word 365), this brief contains 6,626 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).
2. This brief complies with Utah R. App. P. 21(h) governing the filing of public and private records.
3. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 13-point Book Antiqua font.

August 18, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2021, in accordance Utah Rule of Appellate Procedure 21, I emailed a copy of foregoing **APPELLANT'S REPLY BRIEF** to the following:

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